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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1032

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Petitioner, Scott Hudgens, an individual (herein "Hudgens"), respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in this case on October 7, 1974. This decision became final for the purpose of review by this Court on January 22, 1975 when the Supreme Court of Georgia denied petitioner's writ of certiorari.

OPINIONS BELOW

The opinion of the Georgia Superior Court is not and will not be reported; it is reprinted as Appendix A hereto. The initial decision of the Georgia Supreme Court, holding that it lacked jurisdiction to hear an appeal directly from the Superior Court, is reported at 231 Ga. 669, 203 S.E. 2d 478 (1974), and is

reprinted at Appendix B. The subsequent opinion of the Georgia Court of Appeals and order denying rehearing are not as yet reported and are attached as Appendix C and D. The Georgia Supreme Court's denial of petitioner's writ of certiorari is not reported and is reprinted as Appendix E hereto.

JURISDICTION

The opinion of the Court of Appeals of Georgia (App. C, p. A4) issued on October 7, 1974 and became final, for purposes of review by this Court, when the Supreme Court of Georgia denied petitioner's writ of certiorari on January 22, 1975. (App. E, p. A12.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether state courts are preempted by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, from determining whether the unauthorized entry of union pickets on private property constitutes a trespass within the meaning of state criminal trespass statutes.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (herein "the Labor Act"); the Georgia Criminal Trespass Law, Title 26, Ga. Code Ann. § 1503 (herein "the Criminal Trespass Statute"); and the Georgia Declaratory Judgment Act, Title 110, Ga. Code Ann. § 1101, are set forth in the Appendix. (App. F, p. A13-15.)

STATEMENT OF THE CASE

Scott Hudgens, an individual employer with principal offices in Atlanta, Georgia, owns the North DeKalb Shopping Center located in a partially residential, partially small business area of unincorporated DeKalb County, Georgia. The Center is private property.

Local 315, Retail, Wholesale Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The Union represents, *inter alia*, employees of the Butler Shoe Company, an employer who maintains a retail store in the Center.

As a result of a dispute between the Union and Butler over the terms of a new collective bargaining agreement, on January 22, 1971, various members of the Union, acting under its authority, appeared on the interior mall property of the Center in order to picket the Butler store. As soon as the pickets were observed by an agent of Hudgens, they were asked to cease their activities and leave the mall area pursuant to Hudgens' well-established, non-discriminatory policy of forbidding all non-commercial activities on Center premises.[1] The pickets left but returned and resumed picketing which ceased only after they were threatened with arrest under the Georgia Criminal Trespass Statute if they failed to depart. The Union, however, thereafter filed unfair labor practice charges with the National Labor Relations Board, alleging that Hudgens improperly excluded the pickets, and has continued to press those charges.[2]

1. See *Steffel* v. *Thompson*, ... U.S. ....., 39 L. Ed. 2d 505, 512 (1974), which involved Hudgens' exclusion, pursuant to the Criminal Trespass Statute, of Viet Nam war protestors from the North DeKalb Shopping Center. The pendency of the instant action is referred to an n. 22 (..... U.S. ..... at ....., 39 L. Ed. 2d at 524) of that opinion.

2. The Board originally determined that Hudgens had committed an unfair labor practice by excluding the Union pickets (192 NLRB 671). Subsequently, after Hudgens had sought review of this decision, this Court decided *Lloyd Corp.* v. *Tanner*,

For example, as late as October 30, 1974, the Union intervened in proceedings involving those charges then pending before the United States Court of Appeals for the Fifth Circuit.[3] Accordingly, since the Union continues to contend that it has a right to picket upon Hudgens' private property, there is a substantial likelihood that picketing on Center property will occur whenever the Union has a dispute with either Butler or any other Center tenant. Such picketing, Hudgens believes, would constitute a violation of the Criminal Trespass Statute.

As a result of this continuing dispute with the Union, and the likelihood of a resumption of its disputed activities, Hudgens filed the present action under the Georgia Declaratory Judgment Act seeking a declaration that the Union would be in violation of the Criminal Trespass Statute if it engaged in unauthorized entry upon Hudgens' private property. The Union replied by filing a motion to dismiss and a plea to jurisdiction which argued that the dispute was wholly within the jurisdiction of the National Labor Relations Board (App. A, p. A1).

A hearing, not on the merits of the case, but on the motion to dismiss and the plea to jurisdiction, was held on June 26, 1973 in the Superior Court of Fulton County. That Court ruled that jurisdiction of the dispute lay solely with the Labor Board and that the complaint failed to present "a claim cognizable in equity" (App. A, p. A2). The Court of Appeals,[4] addressing

407 U.S. 551 (1973), and *Central Hardware* v. *N.L.R.B.*, 407 U.S. 539 (1973). In light of those cases, the Board obtained a remand from the Fifth Circuit Court of Appeals to reconsider its earlier decision. On remand, the Board (205 NLRB No. 104) proceeded to affirm its previous decision and that decision was, in turn, affirmed by the Court of Appeals, 501 F.2d 161.

3. Hudgens has filed a petition for writ of certiorari in this Court (No. 74-773) from the decision of the Fifth Circuit which is presently pending. On February 11, 1975, Hudgens filed a motion to defer consideration of that Petition until the instant petition was filed.

4. Hudgens had sought direct review by the Georgia Supreme Court since its action arguably raised equitable questions involving the constitutionality of a state statute. The Georgia Supreme Court, however, concluded that it was without jurisdiction (App. B, p. A3) and transferred the appeal to the Court of Appeals.

only the jurisdictional issue, affirmed (App. C, p. A11) and denied petitioner's motion for rehearing (App. D, p. A12). Hudgens' subsequent Court application for certiorari was denied by the Georgia Supreme Court without opinion (App. D, p. A12).

REASONS FOR GRANTING THE WRIT

A. This Case Presents a Significant Question of Federal Law Which Has Not Been, But Should Be, Decided by This Court

This Court should grant review in order to resolve a substantial, recurrent question not heretofore decided by this Court, *viz.*, whether, under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), state courts retain jurisdiction to declare a trespass by union pickets on private property to be violative of state law.

This Court previously recognized the importance of this issue in *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), and *Taggart* v. *Weinacker's*, 397 U.S. 223 (1970). In both cases, certiorari was granted as to the very same question as that presented here. In *Logan Valley*, however, the Court did not reach this question (391 U.S. at 309, n.1; see also the dissenting opinion of Mr. Justice Harlan, 391 U.S. at 333) and the issue was similarly left undecided in *Taggart* when the writ of certiorari there was dismissed as improvidently granted. 397 U.S. at 226. The Chief Justice, in a concurring opinion in *Taggart*, did note that, in his opinion, contrary to the decision of the Georgia courts in this case:

> "[A]ny contention that the States are preempted is without merit. . . . Nothing in [*Garmon*] . . . would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing. . . . A holding that Congress preempted this entire area is as inappropriate here as it was in *Linn* [v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966)],

and for precisely the same reasons. Cf. *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. at 201, 25 L. Ed. 2d at 223 (White J., concurring)."

397 U.S. at 227-29. Mr. Justice Harlan's separate memorandum in *Taggart* disagreed with the Chief Justice's opinion, as well as the view of Mr. Justice White (joined by The Chief Justice and Mr. Justice Stewart) in *Ariadne*, for essentially the same reasons as those relied on by the court below. 397 U.S. at 229-231.

The instant case presents this Court with an appropriate vehicle to resolve this undecided question. If, on the other hand, the decision below is allowed to stand, there will be a number of undesirable results: (1) the present uncertainty and conflict as to whether the States have jurisdiction in the instant circumstances to enforce their trespass laws will continue with the consequence that the rights of unions and employers will vary from forum to forum; (2) States, such as Georgia, which have concluded that their jurisdiction is preempted, will be unable to protect a "deeply rooted" state interest which is of only "peripheral concern" to the Labor Act—the protection of private property rights from trespass (*Taggart*, 397 U.S. at 227-229 (Burger, C. J., concurring)); and (3) property owners will have to rely solely on self-help to protect their property from trespass, with a consequent threat to domestic peace.

B. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the States

One of the reasons this Court granted certiorari in *Linn* was to resolve a similar preemption conflict *i.e.*, the extent to which the labor act preempted state libel action jurisdiction, because "[t]he question . . . has been a recurring one in both state and federal tribunals." 383 U.S. at 57. (footnote omitted) The question presented in this case is of the same magnitude. The extent to which the Labor Act supercedes the jurisdiction of state courts to protect their constituents' private property from trespass has been a recurrent question whose resolution has varied from state to state.

Contrary to the decision below, the courts of many states have asserted jurisdiction, notwithstanding *Garmon*, to decide whether union pickets have trespassed private property in violation of state law. See, *e.g.*, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385, *cert den.*, 368 U.S. 927 (1961), where the Illinois Supreme Court enjoined picketing on a private parking lot;[5] *Marriott Corp.* v. *Rosado*, 70 Misc. 2d 423, 333 N.Y.S. 2d 114 (1972), *aff'd*, 353 N.Y.S. 2d 924 (App. Div. 1974), where union picketing at various terminal buildings at Kennedy and LaGuardia Airports was enjoined; *Jack Loeks Enterprises* v. *Local 291*, 87 LRRM 3105 (No. 74 16697 CZ (Mich. Cir. Ct., Kent County, November 15, 1974), where a preliminary injunction was issued to restrain union picketing on the "parking lot, sidewalk, theatre building, or other associated areas" of a shopping center tenant; *Moreland Corp.* v. *Retail Store Employees Union*, 16 Wisc. 2d 499, 114 N.W. 2d 876 (1962) where the Wisconsin Supreme Court upheld an injunction prohibiting union members from picketing on the private property of a shopping center; and *Hood* v. *Stafford*, 213 Tenn. 684, 378 S.W. 2d 766 (1964), where the Tennessee Supreme Court concluded that it had jurisdiction to enforce against a union picket a state statute which proscribed entering a business or standing outside it for the purpose of enticing anyone therefrom. Other state courts, however, like the Georgia courts in the present case, have reached an opposite result and considered their jurisdiction preempted under *Garmon*.[6] Review by this Court is warranted

5. The Court held that the "State's interest in preserving domestic peace" and "the company's right to protect its property interests" justified an assertion of jurisdiction; it reasoned that "[t]he basic purpose of the statute is the prevention of violence or threats of violence . . .;" that had the State not intervened the employer would have had to forcefully remove the pickets; and that had the employer used force, "the threat of violence . . . [would have been] imminent." 174 N.E. 2d at 388. Thus, the Court rested its holding on a state court's traditional jurisdiction to enjoin violent conduct even where that conduct is also an unfair labor practice under the Labor Act. See, e.g., *United Auto Workers* v. *W.E.R.B.*, 351 U.S. 266 (1956).

6. See, e.g., *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 363 P. 2d 803 (1961), where the Supreme Court

therefore, to resolve a question of federal preemption which has divided state courts and resulted in a concommitant dislocation of national labor policy.

C. The Court Below Has Misconstrued the Decisions of This Court

The court below misconstrued *Garmon*. That case expressly recognized that where—as in the case of trespass—the activity involved is "a merely peripheral concern of the Labor Management Relations Act" or ". . . where the regulated conduct touches interests . . . deeply rooted in local feeling or responsibility" (*Garmon*, 395 U.S. at 243, 244), state jurisdiction is not preempted. The picketing here is encompassed by these principles.

First, unauthorized picketing on private property does not fall within either the proscription or protection of the Labor Act. As the Chief Justice observed in his concurrent opinion in *Taggart:* "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises." 397 U.S. at 227.[7] This un-

of Washington held that, since an action for trespass by a shopping center owner against a labor union was an "arguable subject" of the Labor Act, the Court did not have subject matter jurisdiction; *United Maintenance Co.* v. *Steelworkers*, 86 L.R.R.M. 2364 (No. 13405, West Va. Ct. App., April 9, 1974), where the Court held that it lacked jurisdiction to enjoin a trespass; and *Hennepin Broadcasting Associates* v. *AFTRA*, 84 LRRM 2218 (No. 696356 Minn. Dist. Ct., 4th Dist., Aug. 7, 1973), where the Court denied a motion for a temporary order restraining union picketing on or near a radio station's premises on the ground that its jurisdiction was preempted.

7. See also *e.g.*, *Organizing And The Law, A Handbook for Union Organizers* (1967), by Stephen I. Schlossberg, General Counsel, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does so *without the protection of the Labor Act.* The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from his property. *There is, however, no section of the Taft-Hartley Act available to the employer in this situation.*" (emphasis added.)

availability of a Board remedy "vitiates the ordinary arguments for preemption." *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. at 64; see also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1363 (1972); and Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassing Union Activity*, 83 Harv. L. Rev. 552, 558, 567 (1970). Of course, as in this case, a union may claim that an employer, by invoking self-help or a state trespass law, has violated the Labor Act. The applicability of the state trespass law, however, will be merely incidental, if not irrelevant, to the resolution of that claim. See the petition in No. 74-773, and the underlying decisions therein cited at note 2, *supra*. The necessity of providing a state remedy here, in the absence of providing a federal remedy, is surely as compelling as the converse situation dealt with by this Court in *Steffel*.

Second, trespass is surely a matter which is deeply rooted in local concern. To again quote the Chief Justice in *Taggart:* "The protection of private property . . . through trespass laws is historically a concern of state law." 397 U.S. at 227. There is, after all, an "overriding state interest . . . involved in the maintenance of domestic peace" (*Plumbers Union* v. *Borden*, 373 U.S. 690, 693 (1963)), and the basic purpose of trespass statutes, such as the Criminal Trespass Statute, is "the prevention of violence or threats of violence" *People* v. *Goduto*, 174 N.E. 2d at 387.

The Georgia courts thus have concurrent power, alongside the National Labor Relations Board, to entertain actions involving unauthorized union entry on private property. This is not an unusual situation in labor law; the States and the Labor

Board also have concurrent authority in cases involving libel (*Linn* v. *United Plant Guard Workers Local 114, supra*); breach of a union's duty of fair representation (*Vaca* v. *Sipes*, 386 U.S. 171 (1967)); and picketing where there has been violence or threats of violence (*United Auto Workers* v. *W.E.R.B.*, 351 U.S. 266 (1956)). There may be, in addition, other instances where the Labor Board will defer to state courts for their construction of relevant state law.[8] All of these cases involved an area of traditional state concern which has been regulated by a state law of general application. Trespass is another important state interest, which is similarly regulated by a law of general application. Contrary to the decision below, *Garmon*, it is submitted, did not preclude the States from uniform enforcement of its trespass laws.

8. See, *e.g.*, *Stein Printing*, 204 NLRB No. 2, where the Board, in determining whether an employer had violated Section 8(a)(2) of the Labor Act, utilized a Georgia court's (*Stein Printing Co.* v. *A.T.U., Local No. 48*, Nos. B-66437 and B-67125; 83 LRRM 3029 (1973) construction of its Right-to-Work Law, 54 Ga. Code Ann. § 904) A utilization of the Criminal Trespass Law, as is interpreted by the Georgia courts in this case, would have been similarly desirable in the Hudgens' companion Board case (No. 74-773). Indeed, a decision in the instant case might have presented "substantial and immediate possibility of obviating [the Union's] federal claim by a decision on state law grounds." *Steffel*, 39 L. Ed. 2d at 524, n. 22. A finding, for example, that Hudgen's had no basis for invoking the Criminal Trespass Law against the Union, while not dispositive of the Board case, would, in effect, have negated Hudgen's principal defense in that matter.

CONCLUSION

For all the foregoing reasons, Scott Hudgens respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendices

APPENDIX A

IN THE SUPERIOR COURT
For The County of Fulton
State of Georgia

SCOTT HUDGENS, *Plaintiff*,
vs.
LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, a Labor Organization, et al., *Defendant*.

Civil Action
File No. B-81424

ORDER

The above captioned matter came on before this Court for hearing on two motions by Defendant, Local 315; the two motions being a Plea to Jurisdiction and a Motion to Dismiss. After hearing, the Court reserved a ruling in order to afford counsel the opportunity to submit supplemental briefs and further citations of authority.

The Court has received said supplemental briefs, together with citations of authority, and has reviewed the argument advanced in the briefs, all citations of authority and has considered the argument of counsel at the hearing and, after giving due consideration to each of these factors, enters the following order.

The National Labor Relations Board, and not this Court, is the proper forum for this action and is vested with jurisdiction to administer the law in such cases, therefore the Defendant's Plea to the Jurisdiction is hereby sustained.

Consistently with the above ruling, the Defendant's Motion to dismiss is hereby sustained and the complaint is also ordered dismissed since the petition fails to present a claim cognizable in equity.

IT IS SO ORDERED.

This 26th day of July, 1973.

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

28377. *Hudgens* v. *Local 315, Retail, Wholesale and Department Store Union, AFL-CIO, et al.*

GUNTER, *Justice*. Appellant, Scott Hudgens, has come to the Supreme Court of Georgia seeking review of two adverse judgments in the trial court which dismissed his complaint as to two defendants.

The complaint as originally filed sought a declaratory judgment and injunctive relief against the defendants. However, after the complaint was filed the appellant voluntarily eliminated the injunctive feature from the case. See page 15 of the record and page 23 of the transcript.

The enumeration of errors filed in this Court is as follows:

> "The Supreme Court has jurisdiction of this appeal as an action drawing into question the constitutionality of a statute of the State of Georgia, the Criminal Trespass Law, and since the Court below treated the action as equitable in nature . . . jurisdiction is, therefore, vested in this Court pursuant to Article VI, Section 2, Paragraph 4 of the Constitution of Georgia of 1945."

Having examined the pleadings, the motions, and the argument of counsel before the trial court, we do not find that the constitutionality of Georgia's Criminal Trespass Law (Code § 26-1503) has been drawn into question in this case. This case is simply a delaratory judgment action with no injunctive relief being sought and no constitutional question within the Georgia Supreme Court's appellate jurisdiction being raised. Therefore, jurisdiction of this appeal is in the Court of Appeals of Georgia. The case is accordingly transferred to that court.

It is so ordered. All the Justices concur.

APPENDIX C

49328. *Hudgens* v. *Local 315 Retail & c. Union and Steffel*

CLARK, *Judge*.

Scott Hudgens, owner of a large shopping center, sought a declaratory judgment and injunctive relief in the Fulton County Superior Court. There were three defendants: (1) a local labor union of the Retail, Wholesale, and Department Store Union, AFL-CIO, (2) an unincorporated association engaged in propagandizing against our nation's participation in the Southeast Asia conflict under the name of "The Atlanta Mobilization Committee," and (3) Richard Guy Steffel individually and as a member of that committee. As it was acknowledged in trial court (T. 54) that the AMC was no longer in existence and therefore to be dismissed from this suit, we deal only with the other two defendants. We find their factual and legal positions to be totally disparate. Accordingly we must consider their cases independently of each other. Additionally, it should be noted that plaintiff's voluntary elmination of his equity injunction prayers in the trial tribunal and the absence of any constitutional question resulted in this appeal being transferred to us by the Supreme Court. *Hudgens* v. *Local No. 315 & c. et al.*, 232 Ga. [*sic*] (..... S. E. 2d .....).

The crux of the complaint as stated in its "Introductory Statement" is as follows:

> "Scott Hudgens seeks to have this Court declare that the Georgia Criminal Trespass Law, Title 26, Ga. Code Ann. § 26-1503, . . . may be enforced against the defendants and others similarly situated, and that the defendants be enjoined, pursuant to that law, from trespassing on the private shopping center premises of Scott Hudgens."

As to Steffel

In October 1970, two years before plaintiff landowner filed the instant suit, Steffel and others had sought to distribute handbills in the public areas of plaintiff's shopping center protesting the war in Viet Nam. On the first occasion they complied with the direction from the shopping center's representative to cease and leave. They re-appeared two days later and were again asked to depart from the premises. At least one participant refused to desist and remained on the premises. She was arrested by the DeKalb County police and charged with violation of the Georgia Criminal Trespass statute. Our record does not disclose disposition of these arrest charges but footnote 3 of the U. S. Supreme Court decision of *Steffel* v. *Thompson*, 415 U. S. ....., 39 L. E. 2d 505, 94 S. Ct. 1209, states "that the trial of petitioner's companion, Sandra Lee Becker, has been stayed pending decision of this case."

Steffel complied with the request to leave but thereafter filed a complaint in the United States District Court under the Civil Rights Act wherein he sought a Federal Declaratory Judgment that the Georgia Criminal Trespassing statute was being applied in violation of petitioner's First and Fourteenth Amendment rights. After dismissal of his action in the trial court (*Becker* v. *Thompson*, 334 F. Supp. 1386 (N. D. Ga. 1971)) and affirmance in the Circuit Court of Appeals (*Becker* v. *Thompson*, 459 F. 2d 919 (5th Cir. 1972)) certiorari was granted by the United States Supreme Court. There, in *Steffel* v. *Thompson, supra*, a unanimous court reversed and remanded for the District Court to determine if the controversy still continued in view of the reduction of the nation's involvement in Viet Nam.

The trial record in our appeal to which we are normally limited in considering any case (*Maloy* v. *Dixon*, 127 Ga. App. 151 (1) (193 S. E. 2d 19)) contains nothing as to this Federal litigation. Nevertheless, we recognize all U. S. Supreme

Court decisions and must additionally make reference thereto because Steffel has filed a dismissal motion in our court. He has moved to dismiss the appeal as to him on the basis that it "has been mooted by intervening changes in the fact situation which have eliminated the adversity between the parties." In doing so, Steffel has also provided us with a copy of his letter to the Hon. Albert J. Henderson, Jr. of the U. S. District Court. Therein he quotes the U. S. Supreme Court's suggestion from page 7 of the slip opinion:

> "Since we cannot ignore the recent developments reducing the Nation's involvement in that part of the world, it will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents 'a substantial controversy, between parties having adverse legal interests, sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' "

In his motion in our court to dismiss for mootness he reiterates that he will not return to the shopping center for any handbilling or similar activities.

Appellant argues Steffel's dismissal motion should be denied because of the possibility of a repetition and "the parties should be entitled to know their respective rights when such a confrontation occurs again." The controlling precedents require us to enter a dismissal as to Steffel. "The Georgia Declaratory Judgments Act makes no provision for a declaratory judgment which is merely advisory." *Liner* v. *City of Rossville*, 212 Ga. 664 (94 S. E. 2d 862); *State of Georgia* v. *Hospital Authority*, 213 Ga. 894 (102 S. E. 2d 543). Additionally, there is the absence of the essential prerequisite of "actual controversy" required by Code Ann. § 110-1101. As was quoted with approval from Borchard on Declaratory Judgments (2d Ed.) by our Supreme Court in *City of Nashville* v. *Snow*, 204 Ga. 371, 377 (49 S. E. 2d 808):

> "'. . . [T]he principle of a declaratory judgment is that it declares the existing law on an existing state of facts. The danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events—and the prejudice to his position must be actual and genuine and not merely possible or remote.' "

Appellant eloquently resists granting the moo[illegible]ss dismissal on three grounds. He first asserts the case is not moot because of "the likelihood of recurrence of conflict between the parties regarding the rights of plaintiffs and others to engage in free speech activities on the property of the Center" citing *Diamond* v. *Bland*, 91 Cal. 501, 503 (477 P. 2d 733). This possibility does not exist in view of Steffel's express declaration in both the District Court and our court. His second argument based upon the recent ruling of *Super Tire Engineering Co.* v. *McCorkle*, ... U. S. ..... (94 S. Ct. ....., 40 L. E. 2d 1) is that "without a resolution of the parties' respective claims, its right to operate private commercial enterprise premises without interference may suffer a substantial adverse effect", is likewise not applicable. The third assertion is that the problem is "capable of repetition yet evading review." This is founded on these words used by the Supreme Court in both *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498, 515 (31 S. Ct. 279, 55 L. E. 310) and *Super Tire Engineering Co.* v. *McCorkle, supra.* Such claim disappears in the light of the pending state criminal trespass charges against Steffel's companion and the fact that our decision does not deprive appellant of his undertaking a direct test of his right to forbid activities such as union picketing of tenants and distribution of handbills in the public area of his shopping center whenever such situation occurs by making charges against individuals refusing to recognize his private property claims.

As to the Labor Union Local

The sole question presented by the enumerations of error as to the labor union is whether the state court has jurisdiction of this controversy or whether the matter is one that falls within the exclusive jurisdiction of the National Labor Relations Board. In answering the complaint the defendant union local filed a plea to the jurisdiction, a motion to dismiss, and an answer. The jurisdiction plea averred "The matter alleged in the complaint of the plaintiff constitutes conduct which is either protected or prohibited under the terms of the National Labor Relations Act, as amended (29 U. S. C. § 141, et seq.), in either of which events it lies wholly and exclusively within the jurisdiction of the National Labor Relations Board" (R. 27).

The factual setting as to the union involved a picketing situation by its members of one of the shopping center's stores occupied by a tenant of plaintiff. This incident had occurred on January 22, 1971, almost two years before Hudgens filed this suit in January 1973. In the interim the controversy between Hudgens and the union had already been brought before the National Labor Relations Board which was acknowledged by Hudgens in Paragraph 6 of its complaint (R. 3). The record from pages 31 through 41 contains the National Labor Relations Board decision and order rendered August 16, 1971, and reported as 192 NLRB 671. It recites that on the basis of charges filed on January 25, 1971, by Local 315, the General Counsel of the National Labor Relations Board had issued a complaint and hearing notice against Scott Hudgens. It further recites that "On March 24, 1971, the parties, including the General Counsel, entered into a stipulation in which, *inter alia*, they requested that this proceeding be transferred to the Board." The remainder of the Board's decision details facts similar to those pleaded in the Fulton County Superior Court complaint. Their order concludes that this picketing [*sic*] "is an unfair labor practice affecting commerce within the meaning of Section 2(6)

and (7) of the Act" (R. 38). Thus, it appears that at the time Scott Hudgens went into the Superior Court of Fulton County the controversy between him and the union with his stipulated concurrence was already being dealt with by the National Labor Relations Board.

Both here and in the trial court the briefs show the NLRB ruled adversely to Hudgens who then appealed to the U. S. Court of Appeals for the Fifth Circuit. That court remanded the case to the Board where another ruling (205 NLRB No. 104) adverse to Hudgens was rendered. Their ruling of an unfair labor practice was affirmed in *Hudgens* v. *N. L. R. B.*, 501 F. 2d 161, during the pendency of this appeal. Those decisions were based wholly on federal labor law aspects.

When the Supreme Court of Georgia was first called upon to decide this question of jurisdiction in peaceful picketing cases it ruled in *Curry* v. *Construction & c. Laborers Union*, 217 Ga. 512 (123 S. E. 2d 653) that our state courts had jurisdiction where the peaceful picketing was for an unlawful purpose and in violation of Ga. code §§ 54-804 and 66-9906. Upon appeal this ruling was reversed by the U. S. Supreme Court in *Construction Laborers* v. *Curry*, 371 U. S. 542 (83 S. Ct. 531, 9 L. E. 2d 514), on the basis that the National Labor Relations Act placed such controversies within the exclusive powers of the National Labor Relations Board.

Subsequently our Supreme Court was again called upon to consider this jurisdictional question in a matter pertaining to secondary boycotts in *Armstrong Cork Co.* v. *Joiner*, 221 Ga. 789 (147 S. E. 2d 317). We quote from page 795 of that opinion:

> "The case of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (79 S. C. 773, 3 L. E. 2d 775) sets out the criteria for determining whether State jurisdiction has been pre-empted by the National Labor Relations Act. The court said 'when it is clear or *may fairly be assumed* that the activities which a State purports to

> regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the Federal enactment requires that State jurisdiction must yield.' Id., p. 244. (Emphasis ours.) The court coninued, saying, 'If the board decides, subject to appropriate Federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction.' Id., p. 245. Finally the court said that 'at times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.' "

It therefore appears from this controlling authority that the trial court correctly ruled that as this case involved the question of peaceful picketing it was exclusively within the federal jurisdiction. In fact, a reading of the N. L. R. B. orders which have been appended to the briefs show that the same question raised in the state courts was considered in those proceedings and the union's activities ruled allowable as constituting peaceful picketing.

San Diego Building Trades Council v. *Garmon, supra,* ruled that where an activity is arguably subject to the National Labor Relations Act it is not a matter for state determination. But appellant contends the instant situation comes within the two exceptions mentioned in the opinion. These stated exceptions recognize that States are free to regulate where the activity involved is " a merely peripheral concern of the Labor Management Relations Act," (p. 243) or ". . . where the regulated conduct touched interests so deeply rooted in local feeling or responsibility . . ." (p. 244). Considering that the litgation with the union was still going on in the Federal jurisdiction prior to the filing of the superior court action and that the N. L. R. B. had there ruled that the picketing here complained

of was a protected activity under the Federal Act and had also held that the threat to arrest the pickets for criminal trespass was an unfair labor practice, we find this controversy does not come within either of the two exceptions.

While holding the instant controversy properly belonged in the Federal jurisdiction where it is still pending on appeal we wish to point out that our ruling does not in any way limit the right of the state courts under the police powers of the State to regulate and control disorderly or violent picketing. Furthermore, the State retains the power to prosecute and punish for violations of its criminal statutes. Additionally, our ruling in no way limits the rights of state courts to handle civil damage suits which may arise from labor disputes. Most important,, our refusal to pass upon the right of the appellant to seek declaratory judgment here does not limit our power to construe state laws when we have jurisdiction.

In short, our limited ruling is in conformance with the statement made by the appellant in his brief in the trial court (R. 99) that "The only issue presently before the court, as the hearing herein makes obvious, is one of jurisdiction" and with the trial court's consideration of that single issue.

Judgment affirmed.

BELL, C. J., *and* QUILLIAN, J. *concur.*

APPENDIX D

COURT OF APPEALS OF GEORGIA
Clerk's Office
433 State Judicial Building
Atlanta, Georgia 30334

Case No. 49328. *Scott Hudgens* v. *Local 315, Retail, Wholesale & Department Store Unions, etc.*

The Motion for Rehearing in the above case was Denied today, November 18, 1974.

MORGAN THOMAS, *Clerk*
Tel. 656-3450

APPENDIX E

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1-22-75

Dear Sir:

Case No. 29634, Hudgens v. Local 315 Retail, Wholesale and Department Store Union, AFL-CIO, et al.

The Supreme Court today denied the writ of certiorari in this case.

HILL, *J.*, disqualified.

Very truly yours,

MRS. JOLINE B. WILLIAMS, *Clerk*

APPENDIX F

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* (the "Act") and the Georgia Civil and Criminal Code (1969) are set forth below:

NATIONAL LABOR RELATIONS ACT

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

CIVIL CODE OF GEORGIA

110-1101 Power of superior courts to declare rights and legal relations; cases in which power can be exercised; effect of other adequate remedy

(a) In cases of actual controversy the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights, and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such

declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(b) In addition to the cases specified in paragraph (a) of this section, the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that such declaration should be made, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(c) Relief by declaratory judgment shall be available notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies.

(Acts 1945, p. 137; 1959, pp. 236, 237.)

26-1503 Criminal trespass

(a) A person commits criminal trespass when he intentionally damages any property of another without his consent and the damage thereto is $100 or less, or knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

(b) A person commits criminal trespass when he knowingly and without authority:

(1) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, for an unlawful purpose; or

(2) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

(3) Remains upon the land or premises of another person, or within the vehicle, railroad car, aircraft, or watercraft of another person, after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor.

(Acts 1968, pp. 1249, 1285; 1969, pp. 857, 859.)

Supreme Court, U. S.
FILED
FEB 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1032

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The instant petition, which was filed on Februrary 18, 1975, sought to resolve a significant, undecided question of federal law: whether state courts have jurisdiction to declare a trespass by union pickets on private property to be violative of state law.[1] The Chamber of Commerce of the United States thereafter filed a brief in support of the petition and Respondent Local 315, RWDSU, filed a memorandum which also urged that the petition be granted. The purpose of this supplement is to bring to the Court's attention developments which have occurred since the filing of those documents which bear on the present case.

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1. A companion case, No. 74-773, involving petitioner Hudgens and the National Labor Relations Board has been argued and is awaiting decision.

1. The question raised by the instant petition is presently being litigated before the highest courts of two states, both of which have recently agreed to review the decisions of intermediate courts of appeal. *Sears, Roebuck & Company* v. *San Diego County Dist. Council of Carpenters*, 91 LRRM 2039 (Cal. Ct. App., Oct. 31, 1975); *pet. rev. grant.*, No. ..... (Cal. S. Ct.); *May Department Stores Company* v. *Teamsters Union Local 743*, 90 LRRM 2762 (Ill. Ct. App., Oct. 2, 1975), *pet. rev. grant.*, No. ..... (Ill. S. Ct.). Significantly, the lower courts in these cases reached conflicting results; the California court found that, based on *Central Hardware Company* v. *N. L. R. B.*, 407 U. S. 539 (1973), and other opinions of this Court, state courts were not preempted from prohibiting trespass by union pickets[2] while, conversely, the Illinois court concluded that, under its analysis of *Central Hardware*, the NLRB was vested with exclusive jurisdiction.[3] The pendency of this litigation further underscores the recurrent nature of the question presented, the desirability of a resolution by this Court of the conflict among the states (see pet. for cert., pp. 6-8) and the need for the Court to explicate its own controlling decisions (see pet. for cert., pp. 8-10).

2. On January 26, 1976, this Court granted certiorari in *Hill* v. *Carpenters Local 25*, No. 75-1804, which also presents a *San Diego Building Trades Council* v. *Garmon*, 395 U. S.

2. "The *Central Hardware* decision aids us in resolving the question whether traditional protective actions by states on behalf of real property owner's interest are infringements on the primary competence of the NLRB in matters actually or arguably protected or prohibited under the Act. A principle reasonably to be taken from *Central Hardware* is that so long as the presentation of the traditional concepts of rights inherent in property ownership do not interfere with or alter the effective communications by the union of its point of view, the property owner's rights in his property should be preserved." 91 LRRM at 2043.

3. "A candid assessment of *Central Hardware* . . . reinforces the conclusion that the dispute between Venture and the union organizers was arguably subject to sections 7 and 8(a)(1) of the NLRA." 90 LRRM at 2766.

236 (1959), preemption issue: the related question of whether a union member's damage action in state court is preempted by federal labor law. 44 U. S. L. W. 3424. Concurrent review of *Hill* and the instant case will provide the Court with the opportunity to explore all dimensions of *Garmon* and authoritatively delineate those circumstances in which state courts retain jurisdiction over labor-management disputes.

Respectfully submitted,

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No. 74-1032

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October Term, 1974

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Memorandum For Local 315 RWDSU

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Supreme Court of the United States

October Term, 1974

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LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Memorandum For Local 315 RWDSU

On March 17, 1975 this Court granted the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in *Scott Hudgens* v. *National Labor Relations Board & Local 315, Retail and Wholesale Department Store Union,* No. 74-773. In that case the Fifth Circuit enforced a Board determination that Hudgens, the owner of the North DeKalb Shopping Center in suburban Atlanta, Georgia, violated § 8(a)(1) of the National Labor Relations Act. That violation occurred when Hudgens threatened to have four warehouse employees of the Butler Shoe Company arrested if they continued their peaceful picketing of two entrances to Butler's store located inside the Center in support of Local 315's lawful strike against Butler (which had lasted a ½ hour). The pickets reacted

to Hudgens threat by departing the area and Local 315 then filed an unfair labor practice against Hudgens with the National Labor Relations Board alleging unlawful interference with concerted activity protected by § 7 of the NLRA. (See Pet. in No. 74-773, pp. A1-A3.) Thus, this Court has already agreed to decide whether the NLRB and the Fifth Circuit were right in concluding that Hudgens' prohibition of Local 315's peaceful picketing at the entrances to Butler's Shopping Center store violated § 8(a)(1) of the NLRA.

After Local 315 filed its § 8(a)(1) charge, the instant state court case was instituted by Hudgens. It is a declaratory judgment action in which a declaration is sought that picketing of the entrances to Butler's Shopping Center store by Local 315 in support of its strike would be in violation of Georgia's Criminal Trespass Statute. The Court of Appeals of Georgia affirmed the Trial Court's judgment in favor of Local 315 since "the litigation with the union was still going on in the Federal jurisdiction prior to the filing of [this] superior court action and • • • the N.L.R.B. had there ruled that the picketing here complained of was a protected activity under the Federal Act and had also held that the threat to arrest the pickets for criminal trespass was an unfair labor practice • • •." (Pet. in No. 74-1032, pp. A10-A11.) Thus, the question in this case is whether the Georgia courts were right in concluding that under the circumstances here after the NLRB had asserted jurisdiction the State was without jurisdiction to determine the legality of the very conduct at issue in the Board case.

It is our firm conclusion that the answer the Georgia courts gave to that question is right. If this matter had come before the Court in the ordinary course we would, therefore, have filed a brief in opposition. But we recognize

that two questions noted above are closely brigaded, and that both are equally important and recurring. Since the Court has granted certiorari to consider the substantive issue of federal labor law, we believe that the instant case provides the proper occasion for considering also the companion issue of the metes and bounds of federal and state jurisdiction. For, joint briefing and argument of both questions will provide the Court with the fullest possible appreciation of and insight into what is in essence a single problem.

CONCLUSION

For the above stated reasons the petition for a writ of certiorari to the Court of Appeals of Georgia should be granted, and the instant case should be set for argument in tandem with *Scott Hudgens* v. *NLRB & Local 315, RWDSU*, No. 74-773.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

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---

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS *

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of com-

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* There have been lodged with the Clerk of the Court the written consents of the parties to the captioned proceeding to the filing of this *amicus brief*.

merce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.**

The question presented here, which is of serious importance to the Chamber and its members, is: whether state courts are preempted by the National Labor Relations Act, from their traditional jurisdiction to grant a remedy in trespass for picketing upon private premises, which is not protected by federal legislation. The question is of widespread significance to the labor management community, including the Chamber's members, because absent such state jurisdiction, there is not available any other forum which can grant relief for picketing which exceeds the federal protection. Consequently the resolution of the problem will widely affect the manner in which business firms generally may regulate the use

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** *E.g., N.L.R.B.* v. *Textron, Inc.*, —— U.S. ——, 85 LRRM 2945 (1974); *Geduldig* v. *Aiello, et al.*, —— U.S. ——, 8 F.E.P. Cases 97 (1974); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H.K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers Local 419*, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, —— U.S. —— 85 LRRM 2913 (April, 1974); *N.L.R.B.* v. *Mobil Oil Corp.*, 482 F.2d 842 (1973); *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, —— F.2d ——, 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N.L.R.B.*, —— F.2d ——, No. 73-3264 (CA 5, 1974).

of their property and, more particularly, will affect the method of doing business by retail merchants and others involved in the operation of shopping centers for whom the problem is most acute. The Chamber by virtue of its representation of a broad segment of the business community, and its continuing interest in this area, is in a position to urge views which neither party has urged. The Chamber has previously filed an *amicus brief* in the companion case of *Scott Hudgens* v. *N.L.R.B.*, No. 74-773 (*Scott Hudgens I*), in which a petition for a writ of certiorari is presently being sought.

ARGUMENT

A. Both the Instant Case and *Scott Hudgens I* Should Be Considered Contemporaneously As the Issues Presented Are Interrelated.

The facts and issues of this case intertwine with those of *Scott Hudgens I* and there are considerations of law and policy common to both. Not only does the instant case *(Scott Hudgens II)* in its own right pose a serious question concerning state-federal relations, but together these two cases concisely present crucial facets of the need to balance competing interests with respect to picketing upon private property which is indirectly related to the owner's use thereof. Accordingly the Court should grant the petitions for certiorari and consider both cases together.

In *Scott Hulgens I*, the union conducted its picketing on the premises of a privately owned shopping center in which the picketed employer maintained a place of business; however, the dispute giving rise to the picketing involved employees working at a warehouse located away from the premises and neither the owner of the shopping center nor the employer-lessee could take any measures at the picketed situs to resolve the dispute. For this reason, the picketing was only indirectly related to the

use of the property. The question raised there concerns the accommodation to be made between the union's interest in publicizing its dispute and the proprietary interest of the shopping center's owner who was not involved in the dispute. The instant *Scott Hudgens II*, involving the same picketing and the same parties, arises from the holding of the Georgia state court that its jurisdiction to enforce the state trespass laws is preempted by the federal labor statutes. Here, the accommodation to be made is between the federal labor policy and the deeply rooted state interest in preserving public order through enforcement of its trespass laws.

The resolution of these interrelated questions is of urgent importance to the labor-management community, as well as to the maintenance of the proper balance of federal-state relationships. Further, these companion *Scott Hudgens* cases present a unique opportunity for the Court to fully examine both issues and the interplay of each upon the other.

B. Reasons For Granting The Writs of Certiorari In Scott Hudgens I and II.

1. As this Court has already recognized, the question of whether a state may enjoin picketing that trespasses upon private property poses a "threat of grave state-federal conflict which [this Court] need[s] . . . to resolve." *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 225 (1970). This question has long eluded the Court's scrutiny. (Compare, *Taggart, supra*, with *Amalgamated Meat Cutters, Local No. 427* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 24 (1957) wherein the Court noted that, "Whether a State may frame and enforce an injunction aimed *narrowly* at a trespass . . . [involving picketing conducted upon private premises] is a question that is not here." See also, *Amalgamated Food Employee's Local 590* v. *Logan Valley Plaza*, 391 U.S. 308, 309, n.1

(1968)). Because of the lack of authoritative guidance by this Court, the state courts have reached discordant results.[1] Heretofore, this question appeared in the relatively clear-cut posture in which the federally protected right to picket did not encroach upon the state's enforcement of its trespass laws, since public sidewalks abutting the picketed premises ordinarily offer an adequate alternative site for picketing. (See *Taggart, supra.*) However, the court of appeals, in *Scott Hudgens I*, held the union's interest under federal law sufficient to allow picketing on the private premises of the shopping center, except where there were adequate alternative means of access to the intended audience. The exception was so narrowly construed by the court below as to permit the picketing here, and to create a general standard which significantly impairs the owner's control over the use of his property. This holding plainly creates an incursion upon the traditional power of the state to regulate trespass upon private property. Thus, the problem of reconciling state and federal interests raised in *Scott Hudgens I and II* is even greater than the Court in *Taggart* foresaw. The Court should grant certiorari to define the respective roles of the federal and state authorities in these circumstances.

2. In holding that state jurisdiction was ousted, the Georgia court here, in *Scott Hudgens II*, misconceived the nature of the problem and therefore failed to apply the controlling principles. The federal legislation has not fully occupied the field, for it does not comprehensively regulate picketing on private property. Indeed, as

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[1] Compare the decision of the Georgia court below in *Scott Hudgens II* with the conflicting decisions of other state courts holding their jurisdiction not preempted by the NLRB. *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385 (1961), *cert. den.* 368 U.S. 927; *Hood* v. *Stafford*, 213 Tenn. 684, 378 S.W. 2d 766 (1964); *Morland Corporation* v. *Retail Store Employees Union, Local No. 444*, 16 Wisc. 2d 499, 114 N.W. 2d 876 (1962).

a general rule, picketing on private property is not protected by the Labor-Management Relations Act. *N.L.R.B.* v. *Central Hardware*, 407 U.S. 539 (1972). Even in those exceptional cases where the propriety of such picketing and related activity hinges on alternative means of access,[2] a determination that such alternatives exist will render the picketing unprotected by the federal act. Thus, though such unprivileged picketing is not protected, neither is it prohibited by the Labor-Management Relations Act.

Under these circumstances, the Georgia court misapplied *Garmon*[3] by failing to recognize that state power has not been withdrawn "where the activity regulated was a merely peripheral concern of the Labor-Management Relations Act—. . . [o]r where the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility" (*supra*, 359 U.S. 236, at 244). Few matters are more deeply rooted in state responsibility than the enforcement of trespass remedies as a means of defusing the potential for violence inherent in spontaneous confrontations between parties over the use by one party of the premises of the other.[4] Further, trespass is of only peripheral concern to the administration of the federal act, as the use of private property for picketing is not critical to the federal right except in unusual cases and in those cases no remedy is afforded by the federal act for abuses of the right to picket.

3. The ouster of state jurisdiction would deprive employers and property owners of any remedy whatsoever

[2] See, *N.L.R.B.* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956); *N.L.R.B.* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26 (2nd Cir., 1967).

[3] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

[4] *People* v. *Goduto*, 21 Ill. 2nd 605, 609, 174 N.E. 2d 385, 387 (1961), cert. den., 368 U.S. 927.

where picketing on private premises was neither protected nor prohibited by the federal statute. The N.L.R.B. is not empowered to grant either the employer or owner of such premises relief where it is found that picketing conducted on private property is not priviliged under the federal statute. Professor Archibold Cox has correctly observed:

> ". . . ouster [of state jurisdiction in trespass cases] results in the complete denial of a legal or equitable remedy to employers who by hypothesis are entitled to relief. The cost of denying one group the remedies to which it is entitled seems an extraordinarily heavy price to pay in order to avoid the danger that state tribunals may sometimes err by granting relief barred by the federal act.
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> • • • •
>
> "Nor can the employer secure an NLRB determination that the activities are 'unprotected' even when that would be the ultimate ruling if the question could be raised. Under current practice, the question can arise only if the employer uses self-help to punish employees who engage in the activities and if the union or an employer then files an unfair labor practice charge alleging violation of Section 8(a)(1). The employer who sought to precipitate such litigation would get a ruling much too late to be of value, if he obtained it at all. Possibly the NLRB could change its rules to provide some kind of declaratory proceeding, but even apart from the familiar objections to advisory rulings it is hard to see how the case could be presented and decided with sufficient speed to open the door to state tribunals in time to prevent irreparable harm.
>
> "The short of the matter, therefore, is that in order to avoid the risk of a state court misinterpretation or misfinding, the 'arguably protected' rule shuts the door to determination of the question, and thus de-

> nies the hope for remedy for what might well turn out to be a substantive wrong. In effect, it denies the employer a day in court." (footnotes omitted) Cox, "Labor Law Preemption Revisited", 85 Harv. Law Rev. 1337, at 1362-1363 (May, 1972).

Thus, as in other areas of overlapping concern, such as libel and slander in an organizational campaign, mass picketing and picket line violence, in which traditional state interests converge with the periphery of federal labor policy, the states must be accorded a concurrent role with the NLRB in enforcing the rights of the parties.[5] The need for trespass remedies, which are available only in state courts, is particularly compelling where the picketing is only indirectly related to the use of the property, such as certain forms of informational picketing and picketing to induce sympathetic support for the union. Absent those remedies, the rights of uninvolved property owners will be exposed to serious abuse.

4. The two *Scott Hudgens* cases should be reviewed together because of overlapping considerations germane to each. Thus, the state's interest in maintaining public order through its trespass laws (one of the central factors in *Scott Hudgens II* is entitled to significant weight by the NLRB and the federal courts in delineating the limitations on the federal right to picket upon private premises (which is the problem presented in *Scott Hudgens I*).

The Chamber has urged in its *amicus* brief in *Scott Hudgens I*, that where picketing or other expressive activity is only indirectly related to the use of the property involved, the proponent of the picketing has a heavy

[5] *Linn* v. *Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *Taggart* v. *Weinacker's Inc., supra*, 397 U.S. 223 at 225; *United Auto Workers* v. *W.E.R.B.*, 351 U.S. 266 (1956).

burden in demonstrating the absence of alternative access to the intended audience; and that in such case the required showing is greater than where the picketing is directly related to such property use. In determining what degree of alternative access to the public is required, the Board and the courts should give due deference to the state trespass laws and the legitimate purpose they serve in maintaining public order. The state's interest in this regard supports the Chamber's position that only the lack of any reasonable means of alternative access will justify picketing on private property.

5. Also, a concurrent review of these cases by the Court will underscore the need for flexibility in the relief available to the parties. State forums in many instances provide for declaratory relief, which would be especially useful in those kinds of complex circumstances that characterize *Scott Hudgens I and II*.[6] Unlike the more clear-cut instances in which an adjacent public sidewalk provides ample opportunity for effective picketing of an establishment, the rights of the parties in a shopping center case will hinge on a number of the subtle factual distinctions. Such cases require an analysis of the size, configuration and location of the shopping center; whether the picketing relates to the use of the property directly, indirectly, or not at all; and the extent to which alternative means of access are available. Because of the myriad factual considerations involved, it is all but impossible for the parties even reasonably to foretell their rights in advance of litigation, a situation for which state declaratory relief proceedings are particularly suitable. Without such relief, parties would have to risk criminal prosecution or an unfair labor practice viola-

[6] In view of its holding on the preemption issue, the Georgia Appellate Court found it unnecessary to decide whether declaratory relief would be available in *Scott Hudgens II*. That question of state law remains to be determined if this Court rules that there is concurrent state jurisdiction.

tion in order to obtain a clarification of their rights. The NLRB does not provide for declaratory relief in such circumstances [7] and if exclusive jurisdiction is reposed in that agency, the flexibility possible through state declaratory relief action will be forfeited. The sanctioning of concurrent jurisdiction on the other hand will in many cases obviate the dilemna this Court avoided in *Steffel* v. *Thompson*, —— U.S. ——, 39 L. Ed. 2d 505 (1974). (The *Steffel* case arose out of an anti-war protestor's intrusion upon the premises of the same shopping center involved herein, and the Court there held that the Federal Declaratory Judgment Act was available to determine in advance of threatened prosecution the constitutionality of state trespass laws as applied to such activities.)

6. By addressing itself to both of these cases, the Court will be in a position to consider fully the subsidiary questions involved in according state courts concurrent jurisdiction with the NLRB. One such problem is whether in an action for trespass a state court should confine itself to applying only state law, subject to a subsequent ruling by the NLRB under the alternative access test, that supervening federal interests take precedence; or whether the state court should apply federal law, together with the state law, in order to render a complete adjudication of the parties' rights. Assuming both forums have concurrent jurisdiction to apply federal law, there remains the question of whether the NLRB should defer or give commity to the state court's trespass determinations. See, *Stein Printing Co.*, 204 NLRB No. 2, 83 LRRM 1580 (1973), where the NLRB deferred to a state court's interpretation of local statutes affecting the resolution of the Board proceeding. Because the foregoing problems are brought into clear focus by the two cases herein, the Court has a unique opportunity for comprehensive consideration thereof.

[7] Section 102.98, Rules and Regulations of the NLRB.

CONCLUSION

For the foregoing reasons in the instant case, as well as in *Scott Hudgens I*, we urge the Court to grant the writ of certiorari.

Respectfully submitted,

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Petitioner,

v.

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Respondent.

SUPPLEMENTAL CERTIFICATE OF SERVICE

I, THOMAS CANAFAX, JR., being first duly sworn, depose and say that I have served three copies of the Supplemental Brief in the above-entitled causes, as per statute herein made and provided, on:

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